

No. 18260

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SHIRLEY MAY RIGDON,

Formerly Shirley May Kirschenmann,

Appellee.

On Appeal From the Judgment of the United States
District Court for the Southern District of California.

BRIEF FOR THE APPELLANT.

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No. 18266

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SHIRLEY MAY RIGDON,

Formerly Shirley May Kirschenmann,

Appellee.

On Appeal From the Judgment of the United States
District Court for the Southern District of California.

BRIEF FOR THE APPELLANT.

Opinions Below.

The opinion and order of the District Court denying the Government's motion to dismiss (R. 66-77) are reported at 197 F. Supp. 150. The District Court's findings of fact, conclusions of law and judgment are reported at 209 F. Supp. 267. (R. 105-119.) Its memorandum and order (R. 96-104) are not officially reported.

Jurisdiction.

This appeal involves refunds of federal income taxes for the years 1944 through 1948. Claims for refund were filed on May 7, 1956, and were disallowed on December 16, 1958. (R. 114.) Within the time provided in Section 3772(a)(2) of the Internal Revenue

Code of 1939, and on December 16, 1960, taxpayer brought this action in the District Court for the recovery of taxes and interest thereon. (R. 3-52.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a). The Government's motion to dismiss was denied on August 30, 1961 (R. 66-77), and judgment was entered in favor of the taxpayer on May 2, 1962. (R. 119.) On June 29, 1962, the United States filed its notice of appeal. (R. 122.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

Question Presented.

Whether Sections 1311 to 1315 of the Internal Revenue Code of 1954 mitigate the effect of the expiration of the applicable statute of limitations so that the taxpayer may maintain her refund suit for each of the years 1944 through 1948.

Statutes Involved.

These are set out in the Appendix, *infra*.

Statement.

This case involves taxpayers's refund claims for the years 1944 through 1948. The claims are based upon a prior judicial proceeding which resulted in the disallowance of a rental deduction taken by the taxpayer's parents in 1944. *Kirschenmann v. Westover*, (S.D. Cal.), decided June 30, 1952 (44 A.F.T.R. 1271), affirmed, 225 F. 2d 69 (C. A. 9th), (No. 13-736) certiorari denied, 350 U.S. 834.

The facts pertinent to the instant case are as follows:

The taxpayer, a resident of Kern County, California, is the daughter of Henry and Adeline Kirschenmann

and, since May 12, 1956, the wife of Donald Rigdon. (R. 106.)

In 1944 the taxpayer's parents deeded a quarter section of land to her. Her uncle, Edward Kirschenmann, was appointed her guardian in proceedings in the California Superior Court for Kern County, and, pursuant to an order of that court, the quarter section of land was leased back to taxpayer's parents for a five year term. (R. 106-108.)

Pursuant to the terms of that lease, taxpayer's father paid \$19,412.54 for the year 1944. This amount was deducted by taxpayer's parents as purported rental for 1944 and reported as income on behalf of the taxpayer for that year. (R. 109, 110.) *Kirschenmann v. Westover, supra*, involved the rental deduction taken by the parents.

Taxpayer's father also deducted as alleged rental \$22,351.65 for 1945, \$21,346.94 for 1946, \$7,200 for 1947, and \$15,000 for 1948, and these amounts were reported as income on behalf of the taxpayer for those respective years. (R. 109-110.) While the amounts paid by taxpayer's father for the years 1945 through 1948 were not the subject of the court action in *Kirschenmann v. Westover, supra*, the District Court in the present case found that the purported rental payments for these years as well as 1944 were not required to be made as a condition to the continued use or possession of the subject real property for purposes of Henry Kirschenmann's trade or business. (R. 109, 115.)

In *Kirschenmann v. Westover, supra*, the District Court held that the taxpayer's parents retained an in-

terest in the property deeded to her and that the Commissioner properly refused to allow a deduction for the year 1944 for rent paid pursuant to the terms of their lease as an ordinary and necessary business expense. The judgment was affirmed by this Court on March 8, 1955, rehearing denied, May 31, 1955 (225 F. 2d 69); certiorari was denied on October 10, 1955 (350 U.S. 834); and this Court's mandate was issued on October 24, 1955. (R. 111-112.)

The time for asserting a deficiency against the parents for the year 1945 had expired (Exs. 17 and 17-A, R. 174-185); a deficiency was asserted for their years 1946 through 1948 based on the disallowance of the claimed rental deduction, and the deficiencies were paid. On March 12, 1958, parents filed refund claims for those years. No action has been taken on those claims by the Internal Revenue Service. (R. 112-113.)

Claims for refund of taxes paid by the taxpayer for the years 1944 through 1948 were filed on her behalf on May 7, 1956. (R. 114.) These claims, based on the allegedly erroneous inclusion in her income of the payments made by taxpayer's parents to her (R. 28-52), were disallowed on December 16, 1958. (R. 114.)

On December 16, 1960, taxpayer filed suit for refund of taxes paid for 1944 through 1948, based on the erroneous inclusion of these payments in her gross income for those years. (R. 3-52.) The court denied the Government's motion to dismiss, which motion was based on the untimely filing of the refund claims (R. 53-54, 66), and allowed the taxpayer to proceed to the merits of the case, finding that Sections 1311-1315 of

the 1954 Code applied to mitigate the bar of the statute of limitations (R. 66-77).

The District Court concluded that there had been a “determination” within the meaning of Section 1313 for each of the years 1944 through 1948; that the taxpayer and her parents were related taxpayers within the meaning of Section 1312(1); that the alleged rentals paid by taxpayer’s parents for each of these years were erroneously included in her income; and that the Commissioner maintained an inconsistent position resulting in the double inclusion of an item of income for each of these years as provided by Section 1312(1). (R. 115-118.) Judgment was entered on May 2, 1962, awarding refunds plus interest to the taxpayer for each of the years in issue. (R. 119.)

The Government has appealed.

Specification of Errors Relied Upon.

1. The District Court erred by denying the Government’s motion to dismiss.

2. The District Court erred in holding that the taxpayer satisfied the requirements of Sections 1311-1315 of the Internal Revenue Code of 1954, and, thus, that the taxpayer’s refund claims for each of the years 1944 through 1948 were not barred by the three-year statute of limitations applicable to recovery of alleged overpayments of taxes.

3. The District Court erred in holding and deciding that judgment should be entered for the taxpayer and against the Government.

Summary of Argument.

Sections 1311-1315 of the 1954 Code provide that in certain specified circumstances the bar of the statute of limitations may be lifted in order for the Commissioner to assert a deficiency or a taxpayer to claim a refund. Thus, even though the ordinary period of limitations had long since expired when the refund claims for 1944 through 1948 were filed on behalf of the taxpayer in the instant case, if Sections 1311-1315 are applicable to the facts of her case, then her suit was properly considered by the District Court. It is the Government's position that the mitigation provision does not apply here.

Sections 1311-1315 represent an attempt by Congress to provide a relief measure for both the Commissioner and taxpayers, but they also represent a laborious attempt to protect the essential validity of the statute of limitations by limiting the relief to specifically defined situations.

The instant case does not fit into the framework of the mitigation provision. Thus, it is basic to the operation of the provision that only the "item" which is the subject of a prior "determination" may be the subject of an adjustment under Section 1314. The only determination relevant to this case, the prior judicial action in *Kirschenmann v. Westover, supra*, involved an item of rental which was deducted by taxpayer's parents in 1944. Nevertheless, the District Court held that the inclusion of this item in taxpayer's income for 1944 and other rental items for the years 1945 through 1948 justified the opening of taxpayer's years 1944 through 1948. This results in exclusion of alleged

rent paid to her by her parents in 1945 even though the parents took a rental deduction in 1945 and the Commissioner is barred by the statute of limitations from asserting a deficiency against them for that year. This result of her parents' tax avoidance scheme is wholly out of accord with the mitigation provision and illustrates that the conditions of the statute were meant to be complied with.

The fact is that the remaining errors of the District Court in finding the mitigation provision applicable result from a failure to consider the words of the provision as meaning what they say. Thus, the court held that the disallowance of the parents' rental deduction satisfies the circumstance of adjustment specified in Section 1312(1), *i.e.*, double inclusion of an item of gross income. The provision, however, has maintained from its beginnings in 1938 a strict distinction between items of income and items of deduction, and only in two special situations not present here are correlative inclusion-deduction situations between related taxpayers within its purview. The effect of holding that the disallowance of a deduction for the parents is an inclusion in their gross income is to make unnecessary the double disallowance of a deduction circumstance of adjustment (and to render ineffective the special rules which limit its applicability), making such a situation in effect a double inclusion circumstance of adjustment. The circumstance presented here is just not within the purview of the mitigation provision.

Furthermore, the inconsistent position requirement of the statute means that the prior determination with respect to taxpayer's parents must be logically inconsistent

with the inclusion of the alleged rental item in the taxpayer's gross income. But it is not inherent in the prior determination, and was not so asserted, that the payments to taxpayer in 1944 as alleged rental constituted a gift to her. The payments were considered part of a tax avoidance scheme which were made pursuant to a court-approved lease, and it would appear that the payments did not proceed from a "detached and disinterested generosity," which is the requisite for a gift. Thus, we submit that the inconsistent position requirement of the statute has not been satisfied.

Finally, the District Court held that the taxpayer and her parents were "related taxpayers" within the meaning of the statute, even though the relationships of parent-child, donor-donee, and lessor-lessee were intentionally omitted as separate categories. The court held that the relationship of guardian-ward, between taxpayer and her uncle, was subject to the law of trusts and that the grantor-beneficiary relationship in the statute is applicable here. However, the parents were not grantors in a trust situation, and this construction by the District Court in effect inserts into the statute as related taxpayers those relationships specifically excluded by Congress.

In short, the District Court has construed the mitigation provision in such a way as to make ineffective the very limitations which were painstakingly built into it. The judgment is erroneous and should be reversed.

ARGUMENT.

The District Court Erred in Holding That Under Sections 1311-1315 of the Internal Revenue Code of 1954 the Taxpayer's Refund Claims for the Years 1944 Through 1948 Were Timely.

Ordinarily, when the statute of limitations has run on the right of the Commissioner to assert a tax deficiency or on the right of a taxpayer to claim a refund for overpayment of tax, correction of errors in the barred year is not permitted. However, Sections 1311-1315 of the Internal Revenue Code of 1954 (Appendix, *infra*) provide that under specified circumstances where an error has been made in the inclusion or exclusion of a gross income item or in the allowance or disallowance of a deduction item or in the tax treatment of a transaction affecting the basis of property, the error may be corrected even though the ordinary period of limitations has run.¹

¹This mitigation provision was first enacted as Section 820 of the Revenue Act of 1938, c. 289, 52 Stat. 447. The Senate Finance Committee stated the principles underlying the proposed legislation as follows (S. Rep. No. 1567, 75th Cong., 3d Sess., pp. 49-50 (1939-1 Cum. Bull. (Part 2) 779, 815)):

The legislation here proposed is based upon the following principles:

(1) To preserve unimpaired the essential function of the statute of limitations, corrective adjustments should (a) never modify the application of the statute except when the party or parties in whose favor it applies shall have justified such modification by active inconsistency, and (b) under no circumstances affect the tax save with respect to the influence of the particular items involved in the adjustment.

(2) Subject to the foregoing principles, disputes as to the year in which income or deductions belong, or as to the person who should have the tax burden of income or the tax benefit of deductions, should never result in a double tax or a double reduction in tax, or an inequitable avoidance of tax.

(3) Disputes as to the basis of property should not allow the taxpayer or the Commissioner to obtain an unfair tax

Here, the time for filing refund claims specified in Section 322(b)(1) of the 1939 Code (Appendix, *infra*) had long since expired when claims for the years 1944 through 1948 were filed on behalf of the taxpayer in 1956 (R. 114), and there is no dispute that the taxpayer is not entitled to recovery in this suit if the mitigation provision is not applicable to each of the years in question.²

As pertinent to the instant case, Section 1311(a) provides that if a "determination," as defined in Section 1313, has been made with respect to an error as described in Section 1312, the effect of the error shall be corrected by an "adjustment" made in the amount and manner specified in Section 1314, if, on the date of the determination, correction of the error is otherwise prevented by a law such as the statute of limitations. Section 1311(b)(1) specifies as a necessary con-

advantage by taking one position at the time of the acquisition or property and an inconsistent position at the time of its disposition.

(4) Corrective adjustments should produce the effect of attributing income or deductions to the right year and the right taxpayer, and of establishing the proper basis.

²Of course, Sections 1311-1315 are not designed to afford mitigation of the effect of the statute of limitations in all cases, but only under particular defined and limited circumstances. See Maguire, Surrey & Traynor, Section 820 of the Revenue Act of 1938, 48 Yale L. J. 509, 719 (1939); Holland, Tax Consequences of Inconsistent Position—A Review of Section 3801, N.Y.U. Institute on Federal Taxation (Tenth Annual, 1952) 807. And the party seeking the benefit of the statute is required to meet its specific requirements. *United States v. Rushlight*, 291 F. 2d 508 (C. A. 9th); *Hagan v. United States*, 239 F. 2d 141 (C. A. 9th); *Taxeraas v. United States*, 269 F. 2d 283 (C. A. 8th); *Sherover v. United States*, 137 F. Supp. 778, affirmed *per curiam*, 239 F. 2d 766 (C. A. 2d); *Heer-Andres Investment Co. v. Commissioner*, 22 T. C. 385; *Brennen v. Commissioner*, 20 T. C. 495; *MacDonald v. Commissioner*, 17 T. C. 934.

dition to the allowance of an adjustment under the circumstance of a double inclusion of an item of gross income that the determination must have “adopted” a position “maintained” by the Commissioner which is “inconsistent with the erroneous inclusion” in the gross income of a related taxpayer as defined in Section 1313(c).

The determination relevant to the instant case is based on prior court proceedings. In *Kirschenmann v. Westover* (S. D. Calif.), decided June 30, 1952 (44 A.F.T.R. 1271), affirmed, 225 F. 2d 69 (C.A. 9th) (No. 13,736), certiorari denied, 350 U.S. 834, a claimed deduction by Henry and Adeline Kirschenmann for alleged rental paid to their daughter in the year 1944 was disallowed. The position maintained by the Government and adopted by the District Court and this Court was that the rental agreement constituted a tax avoidance scheme and that the 1944 payments were not properly deductible under Section 23(a) of the 1939 Code.³ This Court rendered its decision on March 8, 1955, and denied rehearing on May 31, 1955. The Supreme Court de-

³Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses*.—

(1) *Trade or business expenses*.—

(A) *In general*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * * rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * *

(26 U. S. C. 1952 ed., Sec. 23.)

nied certiorari on October 10, 1955. On May 7, 1956, claims for refund of taxes paid for the years 1944 through 1948 were filed on behalf of the daughter, taxpayer here. (R. 114.) The claims were disallowed on December 16, 1958 (R. 114), and this suit followed.

The District Court allowed the taxpayer to proceed to the merits of the case, holding that she had demonstrated the applicability of Sections 1311-1315 and that the bar of the statute of limitations is thereby lifted. (R. 66-77.) We submit, however, that this result disregards the laborious attempt of Congress to provide relief in well-defined circumstances, with appropriate safeguards against wholesale mitigation of the statute of limitations. And the remainder of his brief will show that the District Court erred in holding 1) that there was a circumstance of adjustment as defined in Section 1312; 2) that the determination here relevant (the prior judicial proceeding) involved the maintenance and adoption of an inconsistent position as required by Section 1311(b)(1); 3) that the taxpayer was a related taxpayer of her parents as defined in Section 1313(c); and 4) that the determination which involved a rental deduction for 1944 involved items of rent for 1945 through 1948 as to which there has been no other determination as defined in Section 1313(a).

A. The District Court Incorrectly Held That There Was a Circumstance of Adjustment as Provided in Section 1312.

It is fundamental to the scheme of federal income taxation that Congress has provided for the inclusion in gross income of all items of gain or income except those specifically excluded. See Internal Revenue Code of 1954, Section 61 (Appendix, *infra*); *Commissioner*

v. Glenshaw Glass Co., 348 U.S. 426, rehearing denied, 349 U.S. 925. Equally fundamental is the proposition that deductions are a matter of legislative grace, and only such deduction items as are provided in the statute are properly to be taken from gross income in computing taxable income. See Internal Revenue Code of 1954, Section 62 and Section 63 (Appendix, *infra*); *Deputy v. duPont*, 308 U.S. 488. The distinction between items of gross income and items of deduction has been clearly recognized by the Supreme Court. See *Spring City Co v. Commissioner*, 292 U.S. 182; *Commissioner v. Hansen*, 360 U.S. 446. And the distinction is inherent in the makeup of Section 1312 of the 1954 Code, which describes the various circumstances of adjustment within the purview of the mitigation provision.

It may be seen that with the exception of the circumstances of adjustment embraced by Section 1312(5) and Section 1312(6),⁴ the specified circumstances of adjustment refer to either the double inclusion or exclusion of an income item or the double allowance or disallowance of an item of deduction or credit.

The District Court held that the facts of the instant case are within the purview of Section 1312(1), which specifies that the prior determination (here the judicial proceeding in which a rental deduction taken by the taxpayer's parents for 1944 was disallowed) "requires the inclusion in gross income of an item which was erroneously included in the gross income * * * of a related taxpayer." The fact is, however, that there

⁴Section 1312(7) relates to the special problem of basis after erroneous treatment of a prior transaction.

was no determination with respect to income items reported by taxpayer's parents, since the determination related to a deduction item which was disallowed as not satisfying the requirements of Section 23(a) of the 1939 Code (quoted in footnote 3, *supra*).

The distinction between items includible in gross income and items deductible from gross income is basic to the functioning of the mitigation provision as enacted by Congress. Thus, the provision as it originally appeared (Section 820 of the Revenue Act of 1938, c. 289, 52 Stat. 447) included circumstances of adjustment with respect to the double inclusion of an item of gross income, the double allowance of a deduction or credit, and the double exclusion of an item of gross income with respect to which tax was paid. Even though a fiduciary and a beneficiary were then, as now, related taxpayers, it was necessary to include a special circumstance of adjustment to provide for the correlative inclusions in gross income and deductions from gross income as provided by the statute dealing with the taxation of trusts. This special circumstance of adjustment, which now appears as Section 1312(5), was made necessary because the related taxpayer provisions of the other circumstance of adjustment did not remedy a situation where, for example, a trustee was disallowed a deduction but the beneficiary had nonetheless included amounts distributed to him in his gross income. See Maguire, Surrey & Traynor, Section 820 of the Revenue Act of 1938, 48 Yale L. J. 509, 719 (1938), pp. 759-761.

Similarly, in 1958, Congress added a new circumstance of adjustment, Section 1312(6), which pro-

vides for correlative deductions and credits for certain related corporations. This provision was intended to remedy the situation, not otherwise covered, in which, for example, claimed interest deductions of one corporation had been disallowed as representing dividends and the corresponding intercorporate dividend credit had not been taken by the other corporation. See S. Rep. No. 1983, 85th Cong., 2d Sess., p. 81 (1958-3 Cum. Bull. 922, 1002-1003).

It is clear that the statute as originally enacted made a sharp distinction between income items and deduction items. If such a distinction were not followed, then the whole point of dealing separately with deduction items would be lost, obviously contrary to the congressional intent. Thus, for example, Section 1312(4) pertains to a double disallowance of a deduction case, but even though the applicability of this provision is subject to special rules to limit its effect (see Section 1311-(b)(2)(B)), the result of the District Court's decision here would be to turn such a situation into a double inclusion of an item of gross income cognizable under Section 1312(1).

The District Court cited *Gooch Milling & Elevator Co. v. United States*, 78 F. Supp. 94 (C. Cls.), as support for its holding in this case that the disallowance of the rental deduction in the prior suit was an inclusion in gross income. (R. 74-76, 103-104.) We submit that the *Gooch* case and other cases relating to inventory adjustments⁵ are not authority for treating

⁵See *H. T. Hackney Co. v. United States*, 78 F. Supp. 101 (C. Cls.); *Moultrie Cotton Mills v. United States*, 151 F. Supp. 482 (C. Cls.); *United States v. Rachal* (C. A. 5th), decided

items not properly deductible from gross income as inclusions in gross income. It must be remembered that for an accrual basis taxpayer using inventories gross income from business means gross receipts less cost of goods sold. Cost of goods sold is computed by adding inventory held at the beginning of the year and purchases made during the year, and subtracting from this figure inventory still on hand at the end of the year. The greater the cost of goods sold, the lower the gross income from business, and vice versa; and if the value of inventory items is changed, the gross income figure is likewise changed. It was on the basis of this analysis that the Court of Claims made its decision in the *Gooch* case. See 78 F. Supp. pp. 98-99. We fail to see, however, how this rationale supports the holding of the District Court in the instant case. The Internal Revenue Code specifically provides that items of deduction such as rent are deductions *from* gross income (see Section 62 and Section 63 of the Internal Revenue Code of 1954), while Sections 1311-1315 specifically maintain the distinction between deduction items and items of gross income.

The fact is that the instant case does not involve a circumstance of adjustment as specified in Section 1312, and the taxpayer's suit should have been dismissed by the District Court.

December 27, 1962 (63-1 U. S. T. C., par. 9150). See also, *M. Fine & Sons Manufacturing Co. v. United States*, 168 F. Supp. 769 (C. Cls.), and this Court's consideration of that case in *United States v. Rushlight*, 291 F. 2d 508.

B. The District Court Incorrectly Held That There Was Adopted in the Determination (the Prior Suit in Which Taxpayer's Parents Were Disallowed a Rental Deduction) a Position Maintained by the Commissioner Which Is Inconsistent With the Inclusion in Taxpayer's Gross Income.

Section 1311(b)(1) specifies that the mitigation provision applies under the circumstance of a double inclusion only if the prior determination *adopted* a position *maintained* by the Commissioner which is inconsistent with the erroneous inclusion in the related taxpayer's gross income. The inconsistent position requirement, perhaps the most difficult concept appearing in this group of sections, requires a word of explanation to place it in proper focus.

As originally enacted, the mitigation provision contained the inconsistent position requirement with respect to all circumstances of adjustment then provided for. A circumstance of adjustment not provided for, however, now appears as Section 1312(4), and is applicable to the double disallowance of a deduction or credit situation. In discussing the failure of the statute as originally enacted to include such a provision, Maguire, Surrey & Traynor, Section 820 of the Revenue Act of 1938, 48 Yale L. J. 509, 719, 758, commented as follows:

Section 820, however, in neither initial nor final form, covered the situation where the determination disallows a deduction which was erroneously disallowed or omitted in another taxable year. The omission of this case from Section 820 has given rise to severe criticism of the section, and yet from the discussion above it is clear that its in-

clusion would have had the effect of destroying the statute of limitations with respect to deductions. The taxpayer who neglected to take a deduction properly allowable for 1935, as to which year the period of limitations on refund claims had expired, could take that deduction in his return for 1940, or 1941, etc., or claim a refund for those years, force the Commissioner to take a position inconsistent with the omission of the deduction in 1935,¹⁵³ and then, after the Commissioner had won the case, claim an adjustment for 1935. Congress recognized that Section 820 was not the proper vehicle for solving the bad debt problem, for the cure would have been worse than the disease, and consequently the "failure to obtain a deduction" case is not found in subsection (b).¹⁵⁴

¹⁵³The text assumes that the Commissioner to win the case would be forced to specify the year in which the deduction was properly allowable, here 1935, so that he would thereby be maintaining an inconsistent position. If, as is the situation in most bad debt and stock worthlessness cases, the Commissioner successfully defended solely on the ground that the debt did not become bad, or the stock worthless, in the year claimed by the taxpayer, and did not specify the year in which the deduction was properly allowable, there would not be a maintenance of an inconsistent position by the Commissioner and an adjustment could not be obtained by the taxpayer even if the "failure to obtain a deduction" situation were covered in subsection (b).

¹⁵⁴While a shift of position was evident in the omission of income cases where tax was later paid, so that subsection (b)(3) could be included, Congress apparently thought that there was no comparable standard in the deduction cases. It may be possible to provide that, if the deduction had been denied by the Commissioner for the earlier year, later disallowance, where the Commissioner had maintained that the deduction was allowable for the year for which it had previously been claimed and denied, would result in an adjust-

As this text and footnote commentary indicate, the inconsistent position provision requires that the position maintained by the Commissioner and adopted in the determination be logically inconsistent with the treatment of the item in a closed year or by a related taxpayer. In the words of one commentator (Mullock, *The Inconsistent Position: Section 1311(b)(1)*, 12 *Mercer L. Rev.* 300, 302):

The Statute rests on the proposition that the determination when final represents truth. It follows from this that if the respective treatments accorded the same item in the determination and in a closed year cannot both be true then they are contradictions and hence logically inconsistent.

In 1953, the circumstances of adjustment now appearing as Sections 1312(3)(B) and 1312(4) of the 1954 Code were enacted (as Section 3801(b)(6) and (7) of the 1939 Code (26 U.S.C. 1952 ed., Sec. 3801)). In the double disallowance of a deduction case the Commissioner may argue that the original disallowance was based on the failure of the taxpayer involved to meet the statutory criteria and not on the fact that the deduction should properly be taken in an

ment, as here the earlier denial indicates the shift of position on the part of the Commissioner and thus provides a standard whereby the case in which the Commissioner took no action with respect to the earlier year may be differentiated. If, however, the later disallowance did not involve the maintenance of an inconsistent position, but simply resulted from the successful assertion by the Commissioner that the deduction was not allowable in the later year, no adjustment could be secured. See note 153, *supra*. It has been suggested (Comment (1938) 52 *Harv. L. Rev.* 300, 304, that adjustment be allowed to the taxpayer who claimed a deduction in the wrong year when he could prove that he had acted in good faith. The academic merit of such a plan is outweighed, however, by practical administrative difficulties.

other specific year or by a related taxpayer. In the double exclusion of income situation the taxpayer may argue that an income item is not properly includible in his gross income, not maintaining that it is includible in a specific prior year or in the income of a related taxpayer. Thus, the provisions now appearing as Section 1311(b)(2)(A) and (B) were enacted to omit the inconsistent position requirement from these two circumstances of adjustment, with other safeguards being provided, the House Ways and Means Committee noting as follows (H. Rep. No. 894, 83d Cong., 1st Sess., p. 24 (1953-2 Cum. Bull. 508, 525)):

The amendment to the second sentence of Section 3801(b) excepts cases described in paragraphs (6) (7) from the requirement that the adjustment be made only in cases where the other party has maintained an inconsistent position, since cases described in paragraphs (6) and (7) are not attributable to the maintenance of an inconsistent position by the other party to the dispute.

See also, S. Rep. No. 685, 83d Cong., 1st Sess., p. 10 (1953-2 Cum. Bull. 526, 532).

In the instant case the District Court found the existence of an inconsistent position, presumably, by considering the payments made to the taxpayer as gifts. It should be noted, however, that the Commissioner was under no obligation to specify what he considered the disallowed rental deduction to represent in the hands of the recipient of the payments, and the same is true of the courts that considered the prior action. See *Utter-McKinley Mortuaries v. Commissioner*, 225 F. 2d 870, 873 (C.A. 9th). The position maintained by the Com-

missioner and adopted in the determination was that the taxpayer's parents failed to qualify for the deduction taken by them as alleged "rentals or other payments required to be made as a condition to the continued use or possession, for the purposes of the trade or business of property * * *." The Commissioner and the courts considered the payments as in effect the purchase of a tax deduction, not a gift. See 225 F. 2d 69-71. And the necessary result of this determination is not inconsistent with the inclusion of the payments for 1944, however they might be characterized, in the recipient's gross income. See *Commissioner v. Duberstein*, 363 U.S. 278, 285-286, in which the Supreme Court made it clear that the transferor's intention to make a gift (which proceeds from "a detached and disinterested generosity" not "from the incentive of anticipated benefit of an economic nature") is the ultimate fact to be determined when the question of whether a specific payment represents a gift is presented.

The prior determination upon which this case is based indicates that the payments did not proceed from a "detached and disinterested generosity" but rather from a conscious effort to purchase a tax deduction through the use of a state court-approved lease agreement. In any event, no position was maintained by the Commissioner or adopted in the determination that was inconsistent with the inclusion of the payments in taxpayer's gross income. Whether the alleged rental payments in fact represented gifts to the taxpayer would be a proper subject of consideration only if Sections 1311-1315 were applicable to lift the bar of the statute of limitations. We submit that the basic requirement of an in-

consistent position is lacking and that for this reason, as well as for the reason that no circumstance of adjustment is present, the mitigation provision cannot be applied in favor of the taxpayer.

C. The Taxpayer Is Not a Related Taxpayer of Her Parents Within the Meaning of Section 1313(c).

Under Section 1313(c), seven relationships are specified in the definition of "related taxpayers." The District Court held that because under California law the relationship of guardian and ward is subject to the law of trusts, the requisite related taxpayer situation exists in this case between taxpayer and her parents, *i.e.*, the grantor-beneficiary relationship of Section 1313(c)(3). (R. 72-74, 102-103.)

The taxpayer's uncle was appointed her guardian (Exs. 1 and 2, R. 158-161), and he thereafter entered into a lease on her behalf with taxpayer's parents (Exs. 10 and 11, R. 168-173). Indeed her uncle stood in a fiduciary relationship with respect to the taxpayer and was subject to court control, but he was only acting on her behalf; for, the underlying property which was the subject of the lease was deeded to the taxpayer by her parents. (Exs. 9 and 9-A, R. 166-168.) The parents were not the grantors in a trust situation, and the relationship between them and the taxpayer was not that of grantor and beneficiary. Rather, the parties stood in the relationships of parents-child, donors-donee, and, purportedly, lessors-lessee.

When the mitigation provision was first enacted as Section 820 of the Revenue Act of 1938 the Conference Committee noted as follows (H. Conference Rep. No.

2330, 75th Cong., 3d Sess. (1938), p. 58 (1939-1 Cum. Bull. (Part 2) 817, 836):

The conference agreement adopts the substance of the Senate amendment, but makes several changes. the important changes are as follows:

* * *

(3) Assignor and assignee, donor and donee, lessor and lessee, and claimants to ownership of the same property, are eliminated as independent categories of related taxpayers.

It can be seen that the relationships specified in the statute were meant to be exclusive, that parent-child, donor-donee, and lessor-lessee were not omitted from the statute through inadvertence. The fact is that tax avoidance schemes involving parents and their children in the relationships existing in the instant case were intentionally omitted from the benefits afforded by the mitigation provision. The District Court has unjustifiably reinstated the excluded relationships by finding that the taxpayer and her parents were related taxpayers within the meaning of the statute. We submit that the mitigation provision is not applicable to the facts here for this reason in addition to those previously discussed.

D. The District Court Incorrectly Held That There Has Been a Determination With Respect to Any Items for the Years 1945 Through 1948.

The mitigation provision is properly invoked only if there has been a "determination" as defined in Section 1313(a), and, in the case of a refund, only if the refund claim is filed within one year from the date of the determination, as specified in Section 1314(b). The determination relevant to this case is the prior

judicial action in *Kirschenmann v. Westover* (S.D. Calif.), decided June 30, 1952 (44 A.F.T.R. 1271), affirmed, 225 F. 2d 69 (C.A. 9th), certiorari denied, 350 U.S. 834. See Section 1313(a)(1). Within one year from the date the judgment in that case had become final, claims for refund were filed on behalf of the taxpayer.⁶

The prior judicial action involved an item of rent which was taken as a deduction by taxpayer's parents for 1944. No other year and no other rental deduction was involved in that case. Nevertheless, the District Court has held that taxpayer's refund claims for the years 1944 and 1945 through 1948 were timely,⁷ based upon the prior court action. (R. 70-71, 100-101.)

The effect of this holding is to exclude the payments made to the taxpayer in 1945 from her income even though the statute of limitations had run against the Commissioner before he could seek a disallowance of the rental deductions taken by her parents in 1945. (See Ex. 17, at R. 176-179 and Ex. 17-A, at R. 182.)

⁶The claims for refund were filed on May 7, 1956 (R. 114), clearly within the one year period specified in the statute.

The difficulty in determining at what point a court decision has become final is illustrated by the case of *Gill v. Commissioner*, 306 F. 2d 902 (C.A. 5th).

⁷The Commissioner asserted deficiencies against the parents for the years 1946, 1947, and 1948, based upon the disallowance of similar rental deductions taken by them for those years. (R. 112-113.) The parents have filed refund claims for those years, but no action has been taken by the Commissioner, and the claims have not been finally disposed of; thus there has been no "determination" within the meaning of the statute with respect to these claims. See Section 1313(a)(3). The parents have not entered into any agreement with the Commissioner with respect to their liability for the years 1946, 1947, and 1948, which might invoke the mitigation provision on behalf of the taxpayer here. See Section 1313(a)(4).

The tax avoidance scheme of taxpayer's parents with respect to 1945 would thus be successful beyond their hopes if the District Court's holding is allowed to stand.

The error of the District Court in finding Sections 1311-1315 applicable to the years 1945 through 1948 lies in the failure to distinguish between the theory of the disallowance for 1944 and the "item" involved. The mitigation provision is based on the concept of items. It is the item which is the subject of the determination referred to in Section 1312, and it is only with respect to this item that an adjustment with respect to a related taxpayer is authorized under Section 1314. *Gill v. Commissioner*, 306 F. 2d 902 (C.A. 5th); *Cory v. Commissioner*, 261 F. 2d 702 (C.A. 2d), certiorari denied, 359 U.S. 966; *First Nat. Bank of Phila. v. Commissioner*, 205 F. 2d 82 (C.A. 3d); *Central Hanover Bank & Trust Co. v. United States*, 163 F. 2d 60 (C.A. 2d); *Estate of A. W. SoRelle v. Commissioner*, 31 T.C. 272; *MacDonald v. Commissioner*, 17 T.C. 934.

What is meant by "item" as used in Sections 1311-1315 is summarized by Maguire, Surrey & Traynor in their often-quoted article, cited *supra*, as follows (pp. 751-752):

The tax liability for a year is generally a unitary matter, and the concern is whether the correct dollars and cents total has been determined. Section 820, however, fastens upon the treatment accorded a particular item in different years regardless of the correct dollars and cents tax liability for those years. Some difficulty, therefore, may arise in ascertaining what is an "item." The term is not a new one in the income tax— Section 42 refers

to the "amount of all items of gross income," Section 22(b) provides that the "following items shall not be included in gross income." The term "item" thus refers in a qualitative sense to the various matters which make up gross income — salary, dividends, rent, gain on sale of a capital asset, distributed trust income, interest, etc. Salary for 1937 and salary for 1938 are two different items, though in each case the amount may be \$10,000. But if the item is qualitatively the same, as salary for 1937 included in gross income for 1937 and again for 1940, it is immaterial that there is a quantitative difference.

It is obvious that only rental taken as a deduction by taxpayer's parents in 1944 was the subject of the prior judicial proceeding, the determination applicable here. While rental deductions for 1945 through 1948 were perhaps improperly taken by the taxpayer's parents, they were not a subject of the prior determination. It is this type of separate and distinct, although possibly similar, item which is not affected by the adjustments under Sections 1311-1315. *Gill v. Commissioner, supra*; *First Nat. Bank of Phila. v. Commissioner, supra*; *Central Hanover Bank & Trust Co. v. United States, supra*; *Estate of A. W. SoRelle v. Commissioner, supra*; *MacDonald v. Commissioner, supra*.

The District Court relied on the case of *H. T. Hackney Co. v. United States*, 78 F. Supp. 101 (C. Cls.), for its holding that the taxpayer's years 1945 through 1948 may be adjusted. (R. 71, 100-101.) The *Hackney* case involved inventory adjustments for 1938 and 1939, which corrected an accumulated inflation of inventory values from the year 1933. The Court of

Claims allowed a refund for the years 1933 through 1936, because the determination for 1938 included overvaluations (and thus overpayments) in the prior years which, in fact, resulted in the 1938 adjustment. The court was very careful to relate the subject of the 1938 determination to the subject of the prior erroneous treatment in 1933-1936.

Whether the Court of Claims was correct in the *Hackney* case is not the point. It is not authority for the result reached by the District Court in the instant case, a result clearly in conflict with the above-cited authorities.

Conclusion.

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date: 26th day of February, 1963

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APPENDIX.

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * *

(b) *Limitation On Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * *

(26 U.S.C. 1952 ed., Sec. 322.)

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

- (1) Compensation for services, including fees, commissions, and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest;
- (5) Rents;
- (6) Royalties;
- (7) Dividends;

- (8) Alimony and separate maintenance payments;
- (9) Annuities;
- (10) Income from life insurance and endowment contracts;
- (11) Pensions;
- (12) Income from discharge of indebtedness;
- (13) Distributive share of partnership gross income;
- (14) Income in respect of a decedent; and
- (15) Income from an interest in an estate or trust.

* * *

(26 U.S.C. 1958 ed., Sec. 61.)

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

- (1) *Trade and business deductions.*—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

* * *

(26 U.S.C. 1958 ed., Sec. 62.)

SEC. 63. TAXABLE INCOME DEFINED.

- (a) *General Rule.*—Except as provided in subsection (b), for purposes of this subtitle the term "taxable income" means gross income, minus the deduc-

tions allowed by this chapter, other than the standard deduction allowed by part IV (sec. 141 and following).

(b) *Individuals Electing Standard Deduction.*—In the case of an individual electing under section 144 to use the standard deduction provided in part IV (sec. 141 and following), for purposes of this subtitle the term “taxable income” means adjusted gross income, minus—

- (1) such standard deduction, and
- (2) the deductions for personal exemptions provided in section 151.

(26 U.S.C. 1958 ed., Sec. 63.)

SEC. 1311. CORRECTION OF ERROR.

(a) *General Rule.*—If a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314.

(b) *Conditions Necessary For Adjustment.*—

(1) *Maintenance of an inconsistent position.*—Except in cases described in paragraphs (3)(B) and (4) of section 1312, an adjustment shall be made under this part only if—

(A) in case the amount of the adjustment would be credited or refunded in the same manner as an overpayment under section 1314, there

is adopted in the determination a position maintained by the Secretary or his delegate, or

(B) in case the amount of the adjustment would be assessed and collected in the same manner as a deficiency under section 1314, there is adopted in the determination a position maintained by the taxpayer with respect to whom the determination is made,

and the position maintained by the Secretary or his delegate in the case described in subparagraph (A) or maintained by the taxpayer in the case described in subparagraph (B) is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be.

(2) *Correction not barred at time of erroneous action.*—

(A) *Determination described in section 1312(3)(B).*—In the case of a determination described in section 1312(3)(B) (relating to certain exclusions from income), adjustment shall be made under this part only if assessment of a deficiency for the taxable year in which the item is includible or against the related taxpayer was not barred, by any law or rule of law, at the time the Secretary or his delegate first maintained, in a notice of deficiency sent pursuant to section 6212 or before the Tax Court of the United States, that the item described in section 1312(3)(B) should be included in the gross income of the taxpayer for the taxable year to which the determination relates.

(B) *Determination described in section 1312 (4).*—In the case of a determination described in section 1312(4) (relating to disallowance of certain deductions and credits), adjustment shall be made under this part only if credit or refund of the overpayment attributable to the deduction or credit described in such section which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or his delegate or before the Tax Court of the United States, in writing, that he was entitled to such deduction or credit for the taxable year to which the determination relates.

(3) *Existence of relationship.*—In case the amount of the adjustment would be assessed and collected in the same manner as a deficiency (except for cases described in section 1312(3)(B), the adjustment shall not be made with respect to a related taxpayer unless he stands in such relationship to the taxpayer at the time the latter first maintains the inconsistent position in a return, claim for refund, or petition (or amended petition) to the Tax Court of the United States for the taxable year with respect to which the determination is made, or if such position is not so maintained, then at the time of the determination.

(26 U.S.C. 1958 ed., Sec. 1311.)

SEC. 1312. CIRCUMSTANCES OF ADJUSTMENT.

The circumstances under which the adjustment provided in section 1311 is authorized are as follows:

(1) *Double inclusion of an item of gross income.*—The determination requires the inclusion in

gross income of an item which was erroneously included in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer.

(2) *Double allowance of a deduction or credit.*—The determination allows a deduction or credit which was erroneously allowed to the taxpayer for another taxable year or to a related taxpayer.

(3) *Double exclusion of an item of gross income.*—

(A) *Items included in income.*—The determination requires the exclusion from gross income of an item included in a return filed by the taxpayer or with respect to which tax was paid and which was erroneously excluded or omitted from the gross income of the taxpayer for another taxable year, or from the gross income of a related taxpayer; or

(B) *Items not included in income.*—The determination requires the exclusion from gross income of an item not included in a return filed by the taxpayer and with respect to which the tax was not paid but which is includible in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer.

(4) *Double disallowance of a deduction or credit.*—The determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer.

(5) *Correlative deductions and inclusions for trusts or estates and legatees, beneficiaries, or heirs.*—The determination allows or disallows any

of the additional deductions allowable in computing the taxable income of estates or trusts, or requires or denies any of the inclusions in the computation of taxable income of beneficiaries, heirs, or legatees, specified in subparts A to E, inclusive (secs. 641 and following, relating to estates, trusts, and beneficiaries) of part I of subchapter J of this chapter, or corresponding provisions of prior internal revenue laws, and the correlative inclusion or deduction, as the case may be, has been erroneously excluded, omitted, or included, or disallowed, omitted, or allowed, as the case may be, in respect of the related taxpayer.

(6) [As amended by Sec. 59(a) of the Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606] *Correlative deductions and credits for certain related corporations.*—The determination allows or disallows a deduction (including a credit) in computing the taxable income (or, as the case may be, net income, normal tax net income, or surtax net income) of a corporation, and a correlative deduction or credit has been erroneously allowed, omitted, or disallowed, as the case may be, in respect of a related taxpayer described in section 1313(c)(7).

(7) [As renumbered by Sec. 59(a) of the Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606] *Basis of property after erroneous treatment of a prior transaction.*—

* * *

(26 U.S.C. 1958 ed., Sec. 1312.)

SEC. 1313. DEFINITIONS.

(a) *Determination*.—For purposes of this part, the term “determination” means—

(1) a decision by the Tax Court or a judgment decree, or other order by any court of competent jurisdiction, which has become final;

(2) a closing agreement made under section 7121;

(3) a final disposition by the Secretary or his delegate of a claim for refund. For purposes of this part, a claim for refund shall be deemed finally disposed of by the Secretary or his delegate—

(A) as to items with respect to which the claim was allowed, on the date of allowance of refund or credit or on the date of mailing notice of disallowance (by reason of offsetting items) of the claim for refund, and

(B) as to items with respect to which the claim was disallowed, in whole or in part, or as to items applied by the Secretary or his delegate in reduction of the refund or credit, on expiration of the time for instituting suit with respect thereto (unless suit is instituted before the expiration of such time); or

(4) under regulations prescribed by the Secretary or his delegate, an agreement for purposes of this part, signed by the Secretary or his delegate and by any person, relating to the liability of such person (or the person for whom he acts) in respect of a tax under this subtitle for any taxable period.

* * *

(c) *Related Taxpayer.*—For purposes of this part, the term “related taxpayer” means a taxpayer who with the taxpayer with respect to whom a determination is made, stood, in the taxable year with respect to which the erroneous inclusion, exclusion, omission, allowance, or disallowance was made, in one of the following relationships:

- (1) husband and wife,
- (2) grantor and fiduciary,
- (3) grantor and beneficiary,
- (4) fiduciary and beneficiary, legatee, or heir,
- (5) decedent and decedent’s estate,
- (6) partner, or
- (7) member of an affiliated group of corporations (as defined in section 1504).

(26 U.S.C. 1958 ed., Sec. 1313.)

SEC. 1314. AMOUNT AND METHOD OF ADJUSTMENT.

(a) *Ascertainment of Amount of Adjustment.*—In computing the amount of an adjustment under this part there shall first be ascertained the tax previously determined for the taxable year with respect to which the error was made. The amount of the tax previously determined shall be the excess of—

- (1) the sum of—

(A) the amount shown as the tax by the taxpayer on his return (determined as provided in section 6211(b)(1) and (3), relating to the definition of deficiency), if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in section 6211(b)(2), made. There shall then be ascertained the increase or decrease in tax previously determined which results solely from the correct treatment of the item which was the subject of the error (with due regard given to the effect of the item in the computation of gross income, taxable income, and other matters under this subtitle). A similar computation shall be made for any other taxable year affected, or treated as affected, by a net operating loss deduction (as defined in section 172) or by a capital loss carryover as defined in section 1212), determined with reference to the taxable year with respect to which the error was made. The amount so ascertained (together with any amounts wrongfully collected as additions to the tax or interest, as a result of such error) for each taxable year shall be the amount of the adjustment for that taxable year.

(b) *Method of Adjustment.*—The adjustment authorized in section 131(a) shall be made by assessing and collecting, or refunding or crediting, the amount thereof in the same manner as if it were a deficiency determined by the Secretary or his delegate with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the taxable year or years with respect to which an amount is ascertained under subsection (a), and as if on the date of the determination one year remained before the expiration of the periods of limitation upon assessment or filing claim for

refund for such taxable year or years. If, as a result of a determination described in section 1313(a)(4), and adjustment has been made by the assessment and collection of a deficiency or the refund or credit of an overpayment, and subsequently such determination is altered or revoked, the amount of the adjustment ascertained under subsection (a) of this section shall be redetermined on the basis of such alteration or revocation and any overpayment or deficiency resulting from such redetermination shall be refunded or credited, or assessed and collected, as the case may be, as an adjustment under this part. In the case of an adjustment resulting from an increase or decrease in a net operating loss which is carried back to the year of adjustment, interest shall not be collected or paid for any period prior to the close of the taxable year in which the net operating loss arises.

(c) [As amended by Sec. 59(b) of the Technical Amendments Act of 1958. P. L. 85-866, 72 Stat. 1606] *Adjustment Unaffected By Other Items.*—The amount to be assessed and collected in the same manner as a deficiency, or to be refunded or credited in the same manner as an overpayment, under this part, shall not be diminished by any credit or set-off based upon any item other than the one which was the subject of the adjustment. The amount of the adjustment under this part, if paid, shall not be recovered by a claim or suit for refund or suit for erroneous refund based upon any item other than the one which was the subject of the adjustment.

* * *

SEC. 1315. EFFECTIVE DATE.

(a) *In General.*—This part shall apply only to determinations (as defined in section 1313(a)) made after the 90th day after the date of enactment of this title.

(26 U.S.C. 1958 ed., Sec. 1315.)